IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

MARCUS MIAL,	:	
Plaintiff	:	
v.	:	Case No.: 1:11-cv-921
JENNIFER A. SHERIN, et al.,	:	
Defendants.	:	

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION TO EXTEND DISCOVERY AND ALTERNATIVE MOTION TO DISMISS

COME NOW the Defendants, by and through undersigned counsel, Alexander Francuzenko and the law firm of Cook Kitts & Francuzenko, PLLC, and hereby oppose the Plaintiff's Motion to Extend Discovery and Alternative Motion to Dismiss. The Plaintiff cannot show good cause for an extension because his original counsel had the opportunity to pursue mental, emotional, and psychological damages but chose not to. This Court should deny the request for a voluntary dismissal because it would unfairly prejudice the Defendants in light of the advanced stage of this case.

FACTUAL BACKGROUND

The Plaintiff suffered his alleged injuries on February 14, 2010 and filed his Complaint on August 31, 2011. The Defendants have filed their answers. The parties agreed to a discovery plan and exchanged written discovery responses and document productions. The Plaintiff and the Defendants have been deposed. The Plaintiff's previous counsel, Victor M. Glasberg, Esq., chose not to pursue special damages for emotional distress in this case. (Pl.'s Mem. at 1-2.) As a result, no one diagnosed the Plaintiff with post-traumatic stress disorder until after the expert designation deadline passed. The Plaintiff moves to amend the scheduling order over a month after the expert designation deadline. (Pl.'s Mem. at 2.)

ARGUMENT

I. THE PLAINTIFF CANNOT SHOW GOOD CAUSE FOR EXTENDING THE SCHEDULING ORDER'S DEADLINES BECAUSE HIS ATTORNEY DELIBERATELY CHOSE NOT TO PURSUE SPECIAL DAMAGES FOR EMOTIONAL DISTRESS

A party seeking to change a scheduling order must demonstrate good cause and obtain the consent of the trial judge. Fed. R. Civ. P. 16(b)(4); Vernon Const., Inc. v. Highland Mortg. Co., 187 Fed.Appx. 264, 265 (4th Cir. 2006). The "good cause" analysis considers the moving party's timeliness and any reasons for delay. See Montgomery v. Anne Arundel County, Md., 182 Fed.Appx. 156, 162 (4th Cir. 2006) (not selected for publication).[1] Here, the Plaintiff moved to amend the scheduling order over a month after the relevant deadline had passed. (Pl.'s Mem. at 2.) The reason for the delay is that the Plaintiff's predecessor counsel, Victor M. Glasberg, Esq., consciously chose not to pursue special damages for emotional distress in this case. (Pl.'s Mem. at 1-2.) As a result, no one diagnosed the Plaintiff with post-traumatic stress disorder before the expert designation deadline passed.

"A party voluntarily chooses his attorney as his representative in the action, and, thus, he cannot later 'avoid the consequences of the acts or omissions of this freely selected agent.'" Robinson v. Wix Filtration Corp. LLC, 599 F.3d 403, 409 (4th Cir. 2010) (quoting Link v. Wabash R.R. Co., 370 U.S. 626, 633-34 (1962)). "Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be

[1] While the Montgomery case was not selected for publication, it has been cited extensively by courts in this District for its analysis of the Rule 16(b) good cause standard. See, e.g., PBM Products v. Mead Johnson Nutrition Co., Action No. 3:09-CV-269, 2009 WL 4665746, at *1 (E.D. Va. Dec. 1, 2009)

charged upon the attorney.'" Link, 370 U.S. at 634 (quoting Smith v. Ayer, 101 U.S. 320, 326 (1879)). The appropriate remedy is a malpractice suit against an attorney, if indeed the attorney's conduct was negligent. Universal Film Exchs., Inc. v. Lust, 479 F.2d 573, 577 (4th Cir. 1973) (citing Link, 370 U.S. at 634 n. 10). Otherwise, the court "would be visiting the sins of plaintiff's lawyer upon the defendant." Link, 370 U.S. at 634 n. 10. The Fourth Circuit has not hesitated to hold a plaintiff bound by his attorney's actions. See Riggs v. Wal-Mart Stores, Inc., 119 Fed.Appx. 569 (4th Cir. 2005) (*per curiam*) (holding that remedy for attorney's failure to subpoena key witnesses was malpractice suit against attorney). The Universal Film Exchanges court dealt with a motion under Fed. R. Civ. P. 60(b)(1), Universal Film Exchs., Inc., 479 F.2d at 574, and the Robinson court dealt with a motion to vacate a default judgment, Robinson, 599 F.3d at 405, but the same analysis should apply to extensions of discovery deadlines. See Plowman v. Cheney, 714 F.Supp. 196, 201 (E.D. Va. 1989) (holding that failure to timely file complaint "is not excused by a tactical decision to pursue alternative avenues of relief"). Further, these cases all involve actual neglect by the attorney, not, as here, mere disagreement as to the appropriate course of litigation. If the Fourth Circuit holds a party bound by his attorney's gross negligence, surely a party is bound by his attorney's good-faith decision about whether to pursue a category of damages.

Courts in the Fourth Circuit have not addressed a case of latent PTSD, but other courts have done so in other contexts (generally, Social Security disability or veteran's benefits) and refused to give legal benefit to the PTSD claimant during the disorder's latency period. For example, in Adame v. Apfel, the Tenth Circuit considered whether a Social Security disability claimant had PTSD prior to the expiration of his disability benefits insurance. Adame, 4 Fed.Appx. 730, 731 (10th Cir. 2001) (not selected for publication). The claimant, Adame, contended that he suffered from, but was not diagnosed with, PTSD prior to the expiration date because he was in denial and self-medicating. Id. The Tenth Circuit affirmed the administrative law judge's determination that Adame had not established PTSD prior to the expiration date, expressly rejecting Adame's argument that his PTSD was not diagnosed because it was latent. Id. at 734. PTSD may avoid diagnosis in some cases, and its sufferers may be less likely to recognize their symptoms, but courts do not consider this as part of their *legal* analysis.

Over a month after the expert designation deadline passed, the Plaintiff moved this Court for an extension because he disagreed with his previous counsel's litigation strategy. However, in the Fourth Circuit, he is bound by his attorney's acts and omissions, including the decision not to pursue special emotional damages. This Court should therefore leave the scheduling order intact and allow the case to proceed.

II. THE DEFENDANTS WOULD BE UNFAIRLY PREJUDICED BY A VOLUNTARY DISMISSAL BECAUSE THIS CASE HAS PROGRESSED FAR THROUGH THE LITIGATION PROCESS

Fed. R. Civ. P. 41(a)(2) allows a plaintiff to ask the court to dismiss his case "only by court order, on terms that the court considers proper." Id. This Court has discretion to permit or deny a voluntary dismissal under Rule 41(a)(2). Davis v. USX Corp., 819 F.2d 1270, 1273 (4th Cir. 1987) (citing McCants v. Ford Motor Co., 781 F.2d 855, 857 (11th Cir. 1986)). The Court may deny dismissal when the defendant will be unfairly prejudiced in a way which cannot be remedied. Id. If the Court permits dismissal, it must place conditions on the dismissal in order to protect the defendants' interests. Id. (citing McCants, 781 F.2d at 856). As a case approaches readiness for trial, this Court's authority to deny voluntary dismissal grows. Paturzo v. Home Life Ins. Co., 503 F.2d 333, 335-36 (4th Cir. 1974). If the proceedings have reached an "advanced stage", the Court may deny voluntary dismissal. Armstrong v. Frostie Co., 453 F.2d

914, 916 (4th Cir. 1971) (holding that trial court could have denied voluntary dismissal after hearing argument on motion to dismiss for failure to state claim); Andes v. Versant Corp., 788 F.2d 1033, 1036-37 (4th Cir. 1986) (finding no abuse of discretion in refusing to dismiss without prejudice where plaintiff had obtained judgment in English court, filed to recover in Maryland, conducted discovery, and faced summary judgment motion by defendant); Rollison v. Wash. Nat. Ins. Co., 176 F.2d 364, 366 (4th Cir. 1949) (affirming denial of voluntary dismissal where parties had already conducted discovery, which revealed no cause of action); Seligman v. Tenzer, 173 Fed.Appx. 280, 283 (4th Cir. 2006) (affirming denial of voluntary dismissal after discovery closed, defendants had filed for summary judgment, and trial was three weeks away). Rule 41(a)(2) cannot be used "to avoid or undo the effect of an unfavorable order or ruling." RMD Concessions, LLC v. Westfield Corp., Inc., 194 F.R.D. 241, 243 (E.D. Va. 2000); Shabazz v. PYA Monarch, LLC, 271 F.Supp.2d 797, 800-01 (E.D. Va. 2003) (denying voluntary dismissal where plaintiff had failed to timely make a jury demand);

Judge Ellis of this Court faced a very similar situation and held that the plaintiff could not obtain a voluntary dismissal without prejudice. Teck Gen. P'ship v. Crown Cent. Petroleum Corp., 28 F.Supp.2d 989, 992-93 (E.D. Va. 1998). In Teck General Partnership, as here, the plaintiff failed to obtain a complete expert report prior to the deadline for such disclosures and moved for voluntary dismissal. Id. at 991-92. The Court considered four factors in deciding whether to permit voluntary dismissal: "(1) the opposing party's effort and expense in preparing for trial; (2) excessive delay or lack of diligence on the part of the movant; (3) insufficient explanation of the need for a dismissal; and (4) the present stage of the litigation, i.e., whether a motion for summary judgment is pending." Id. at 991 (quoting Gross v. Spies, 133 F.3d 914, 1998 WL 8006, at *5 (4th Cir. 1998) (unpublished disposition)). The defendant had already answered the complaint, answered discovery requests, propounded its own discovery requests, filed two motions to compel, and filed a motion to strike the plaintiff's expert, and these events "weigh[ed] persuasively against granting a dismissal." Id. at 992. Further, the plaintiff was not prepared for trial due to its counsel's lack of diligence. Id. On those bases, the Court declined to permit voluntary dismissal, leaving the plaintiff in the litigation but, presumably, without expert witnesses. Id. at 993.

Here, the Plaintiff filed his Complaint on August 31, 2011, based on events which took place on February 14, 2010, nearly two years ago. Since then, the case has created nearly 60 PACER events. The printed component of this case's file occupies three boxes in the Defendants' counsel's office. The Defendants have filed their answers. The parties agreed to a discovery plan. They exchanged written discovery responses and document productions. The Defendants produced over 500 pages of discovery material. Defendants Sherin, Sayre, and Ferguson have been deposed extensively (308, 141, and 132 transcript pages, respectively). The Plaintiff was deposed on January 19, 2012. This case's procedural posture is very similar to that in Teck General Partnership, which strongly suggests denying a voluntary dismissal. A voluntary dismissal might require the Defendants to re-litigate any number of issues from the instant case. It would also delay the Defendants' right to a final determination of this matter.

Further, while the Defendants do not contend that the Plaintiff's predecessor counsel, Mr. Glasberg, was not diligent, the Plaintiff evidently thought Mr. Glasberg was not diligent, at least on the issue of the Plaintiff's emotional damages. But, as noted above, the Plaintiff was free to select his attorney, and he cannot avoid his attorney's acts and omissions by claiming innocence or disagreement. In short, the fact that Mr. Glasberg chose not to designate a mental-health expert is imputed to the Plaintiff. He cannot escape the consequences of that decision, but a voluntary dismissal would allow him to do so.

If the Court decides, contrary to the law of the Fourth Circuit, to grant a voluntary dismissal, it should require that the Plaintiff:

1. consent to incorporating into the re-filed case all discovery completed in this case, Davis, 819 F.2d at 1276; and
2. be responsible for both parties' costs and expenses incurred in this case, not including attorney's fees, id.

CONCLUSION

This Court should deny the Plaintiff's request for an extension of the scheduling order and decline to permit a voluntary dismissal.

Respectfully submitted,

_____________/s/_______________________

Alexander Francuzenko
VA Bar #36510
Attorney for Defendants, Sherin, Ferguson, and Sayre
Cook Kitts & Francuzenko, PLLC
3554 Chain Bridge Road, Suite 402
Fairfax, VA 22030
(703) 865-7480 (office)
(703) 434-3510 (fax)
alex@cookkitts.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have served a copy of the foregoing Opposition to Plaintiff's Motion to Extend Discovery and Alternative Motion to Dismiss via ECF Transmission and U. S. Mail, this the 23rd day of January, 2012 to:

Steven David Stone, Esq.
Steven David Stone, PC
1004 Prince Street
Alexandria VA 22314

________________/s/___________________
Alexander Francuzenko
VA Bar #36510
Attorney for Defendants, Sherin, Ferguson, and Sayre
Cook Kitts & Francuzenko, PLLC
3554 Chain Bridge Road, Suite 402
Fairfax, VA 22030
(703) 865-7480 (office)
(703) 434-3510 (fax)
alex@cookkitts.com